FILE COPY

Supreme Court, U. S.
FILED
DEC 26 1972
[illegible]

IN THE

SUPREME COURT OF THE UNITED [illegible]

October Term, 1972

No. 72-511

STATE OF CALIFORNIA,

Petitioner,

vs.

EDGAR A. HILLS, JR.,

Respondent.

RESPONSE TO A PETITION
FOR A WRIT OF CERTIORARI
To the California Superior Court
for the City and County of San Francisco,
Appellate Division

GILBERT C. CATON, Esq.
A Member of the Bar of this Court

6430 Sunset Blvd., Suite 721
Hollywood, California 90028
Telephone: (213) 464-7158

-and-

FRANK BACON, Esq.
5900 Wilshire Blvd., Suite 2100
Los Angeles, California 90036
Telephone: (213) 938-4251

Attorneys for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-511

STATE OF CALIFORNIA,

Petitioner,

vs.

EDGAR A. HILLS, JR.,

Respondent.

RESPONSE TO A PETITION
FOR A WRIT OF CERTIORARI
To the California Superior Court
for the City and County of San Francisco,
Appellate Division

GILBERT C. CATON, Esq.
A Member of the Bar of this Court

6430 Sunset Blvd., Suite 721
Hollywood, California 90028
Telephone: (213) 464-7158

-and-

FRANK BACON, Esq.
5900 Wilshire Blvd., Suite 2100
Los Angeles, California 90036
Telephone: (213) 938-4251

Attorneys for Respondent

TOPICAL INDEX

	Page
Table of Authorities	iii
STATEMENT OF THE CASE	2
A. Proceedings In The State Courts	2
B. Statement Of The Facts	2
IT IS RESPECTFULLY SUBMITTED THAT THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN OR GRANT PETITIONER'S PETITION FOR A WRIT OF CERTIORARI	6
THE DECISION OF THE COURT BELOW IS CORRECT, IS BASED SOLELY UPON INDEPENDENT STATE GROUNDS, AND DOES NOT INVOLVE A FEDERAL QUESTION, THEREBY PRECLUDING A GRANT OF CERTIORARI	8
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	9
ARGUMENT	11
IT IS THE SETTLED LAW OF BOTH CALIFORNIA AND THE UNITED STATES THAT A PEACE OFFICER, HAVING PROBABLE CAUSE TO ARREST A MOTORIST FOR DRIVING WHILE INTOXICATED, MUST NONETHELESS PERFECT A VALID AND LAWFUL ARREST OF THE MOTORIST INVOLVED, BEFORE SUCH PEACE OFFICER'S AUTHORITY COMES INTO FRUITION TO CONDUCT A WARRANTLESS SEARCH	

Page

BY WAY OF EXTRACTION OF THE MOTORIST'S BLOOD FOR ALCOHOL ANALYSIS, "EMERGENCY" CONDITIONS ATTENDING TO THE SITUATION NOTWITHSTANDING 11

CONCLUSION 26

COPY BOUND TO

TABLE OF AUTHORITIES

Cases	Page
Agnello v. United States, 269 U.S. 20	17
Coolidge v. New Hampshire (1971) 403 U.S. 443	19
Department of Mental Hygiene of California v. Kirchner (1965) 380 U.S. 194	8
Dixon v. Duffy (1951) 342 U.S. 33	7
Edelman v. People of the State of California (1953) 344 U.S. 357	7
Jones v. United States, 357 U.S. 493	19
Katz v. United States (1967) 389 U.S. 347	17
McDonald v. United States, 335 U.S. 451	19
People v. Hatcher (1969) 2 Cal.App.3d 71	12
People v. Manis (1969) 268 Cal.App.2d 653	12
People v. Superior Court, Hawkins Real Party in Interest (1972) 6 Cal.3d 757	8, 9, 15, 16

TOO CLOSE IN CENTER

Cases	Page
Schmerber v. California (1966) 384 U.S. 757	15, 16, 18
United States v. Jeffers, 342 U.S. 48	17, 19
Wong Sun v. United States, 371 U.S. 471	17
Constitution	
United States Constitution:	
Fourth Amendment	17
Codes	
California Penal Code:	
§834	11
§836.5	12
§841	13
§849	13
28 U.S.C. §1257 (3)	6
California Vehicle Code:	
§40500	14, 23

COPY BOUND TO

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-511

STATE OF CALIFORNIA,

Petitioner,

vs.

EDGAR A. HILLS, JR.,

Respondent.

RESPONSE TO A PETITION
FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA SUPERIOR COURT
FOR THE CITY AND COUNTY OF SAN FRANCISCO,
APPELLATE DIVISION

Respondent, EDGAR A. HILLS, JR., respectfully presents this, his Response to the Petition For Writ of Certiorari by Petitioner, the STATE OF CALIFORNIA, and respectfully prays that Petitioner's Petition For Writ of Certiorari be denied.

TOO CLOSE IN CENTER

STATEMENT OF THE CASE

A. Proceedings In The State Courts

It would appear that Petitioner has correctly set forth the proceedings had in the Courts below.

B. Statement Of The Facts

It would likewise appear that Petitioner has correctly set forth the facts insofar as the reported facts serve its posture in this case; Respondent feels that certain critical matters which Petitioner has failed to set forth are found in the reporter's transcript of testimony heard in San Francisco Municipal Court on February 22, 1972, during the hearing on Respondent's motion to suppress evidence of the blood sample, commencing at page 17 of the reporter's transcript, line 5, upon cross-examination of Officer James Leonard, as follows:

> Q: At any time during the contact which you had with Mr. Hills on

COPY BOUND T

the evening -- or the morning in question, did you ever advise him of any rights that he had to remain silent?

A: No, I did not.

Q: How about the right that anything he said may be used against him in court?

A: I did not.

Q: Did you ever offer Mr. Hills any choice of a test of his urine or breath, in addition to any serology?

A: I did not.

Q: Now, you say you filed a Complaint. How do you go about filing a Complaint?

A: I just turned it in to the office. It reaches the D.A. and the D.A. makes a recommendation and comes back, and you write a ticket. A Complaint goes via this report. The report is turned in to the office.

D TOO CLOSE IN CENTER

Q: Did you place any restraint upon Mr. Hills in the hospital? Did you leave any instructions that he was not to leave?

A: No, I did not.

Q: So, in other words, he was free to go?

A: Yes, he was released to the hospital.

Q: Did you have Mr. Hills sign any citation or notice to appear?

A: He was incapable to, but we did not have him do that anyway.

Q: I move to strike his 'incapable' as being conclusion.

THE COURT: Did you?

THE WITNESS: He did not sign anything, no.

MR. BACON: Q: Did you prepare one and attempt to have him sign it at any point in time?

A: I did not.

COPY BOUND TO

On direct examination, after being called as witness, Respondent testified as follows at page 21 of the reporter's transcript, commencing at line 17:

Q: What happened after this conversation with the blood test? Did you go to sleep?

A: Yes. They put me in a ward and I went to sleep.

Q: Did they tell you that they couldn't leave?

A: No.

Q: Were you notified in any respect at that point in time that you were to appear in Court?

A: No.

Q: Did anybody attempt to prevent you from leaving the hospital?

A: No.

Q: Did you have to make any kind of security deposit to assure your appearance in court or any place?

A: No.

IT IS RESPECTFULLY SUBMITTED THAT THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN OR GRANT PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

Petitioner has invoked the jurisdiction of the United States Supreme Court to grant certiorari in this case under the provisions of Title 28, United States Code, Section 1257 (3), which provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(1) * * *
>
> "(2) * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant

COPY BOUND TO

to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercise under, the United States."

It appears to be a well-settled principle of case law that the United States Supreme Court cannot grant certiorari involving a state Court decision, when such state Court decision is based upon adequate, independent state grounds.

Dixon v. Duffy (1951)
342 U.S. 33;

Edelman v. People of the State of California (1953)
344 U.S. 357.

Further, it appears equally well-settled that certiorari will not be granted unless it obvious that a Federal question was the sole basis of an erroneous decision

TOO CLOSE IN CENTER

by the state Court from which review is sought.

Department of Mental Hygiene of California v. Kirchner (1965) 380 U.S. 194.

THE DECISION OF THE COURT BELOW IS CORRECT, IS BASED SOLELY UPON INDEPENDENT STATE GROUNDS, AND DOES NOT INVOLVE A FEDERAL QUESTION, THEREBY PRECLUDING A GRANT OF CERTIORARI

In 1972, the California Supreme Court decided the case of People v. Superior Court, Hawkins Real Party in Interest (1972) 6 Cal.3d 757, positively holding that, in order for law enforcement officers to either make, or cause to be made, a warrantless intrusion by way of search into a person's body for the purposes of extracting blood for a blood alcohol sample, there must be an antecedent, pre-existent and lawful arrest.

Even the most cursory reading of the decision of the Appellate Department of the Superior Court of California for the City and County of San Francisco, the Court

COPY BOUND TO

below, attached as Appendix "A" to Petitioner's Petition herein, will show that the Court below followed the ruling of People v. Superior Court, supra, as well as established decisions of the United States Supreme Court, in reversing the decision of the San Francisco Municipal Court and holding that the blood sample of Respondent be suppressed.

In its decision, now final, of People v. Superior Court, supra, the California Supreme Court also appears to have placed at rest any uncertainty of pre-existing California appellate decisions as is suggested by Petitioner on pages 19 and 20 of its Petition herein.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

No Federal question was involved in the decision of the Court below, and, further, the decision of the California Supreme Court in People v. Superior Court, Hawkins Real Party in Interest (1972) 6 Cal.3d 757, does not "misperceive" the thrust of the

D TOO CLOSE IN CENTER

United States Supreme Court's decisions pertaining to the taking of blood samples from motorists suspected of intoxication. Respondent respectfully submits that the law is, has been, and, should remain to be, that a lawful arrest is an indispensable prerequisite for a warrantless search into a person's body. No uniformity of decisions is required, as the decision of the Court below not only follows the law of California, but is also soundly in accord with the laws of the United States, as have been previously decreed by this reviewing Court. Certiorari should not be granted.

COPY BOUND TO

ARGUMENT

IT IS THE SETTLED LAW OF BOTH CALIFORNIA AND THE UNITED STATES THAT A PEACE OFFICER, HAVING PROBABLE CAUSE TO ARREST A MOTORIST FOR DRIVING WHILE INTOXICATED, MUST NONETHELESS PERFECT A VALID AND LAWFUL ARREST OF THE MOTORIST INVOLVED, BEFORE SUCH PEACE OFFICER'S AUTHORITY COMES INTO FRUITION TO CONDUCT A WARRANTLESS SEARCH BY WAY OF EXTRACTION OF THE MOTORIST'S BLOOD FOR ALCOHOL ANALYSIS, "EMERGENCY" CONDITIONS ATTENDING TO THE SITUATION NOTWITHSTANDING

The Legislature of the State of California had enacted various statutory guidelines for the making of arrests, as were in force and effect on November 18, 1971, the date upon which Respondent and Officers of the California Highway Patrol intersected in their encounter which has formed the basis for these proceedings.

Section 834, California Penal Code, provides:

> "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace-officer or by a private person."

The Courts of California have held that a "detention" is not an arrest, People v. Manis (1969) 268 Cal.App.2d 653, and that actual restraint of the person and taking him into custody are essential elements of any "arrest." People v. Hatcher (1969) 2 Cal.App.3d 71.

Section 836.5, California Penal Code, in pertinent part, provides:

> "(a) A public officer or employee, when authorized by ordinance, may arrest a person without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a misdemeanor in his presence which is a violation of statute or ordinance which such officer or employee has the duty to enforce.
>
> "(c) In any case in which a person is arrested pursuant to subdivision (a) and the person arrested does not demand to be taken before a magistrate, the public officer or employee making the arrest shall prepare a written notice to appear

COPY BOUND T

and release the person on his promise to appear * * *."

Section 841, California Penal Code, in pertinent part, provides:

"The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or the person to be arrested is pursued immediately after its commission, or after an escape."

Section 849, California Penal Code, in pertinent part, provides:

"(a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, shall, without unnecessary delay, be taken before the nearest or most accessible

ID TOO CLOSE IN CENTER

magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate.

"(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

(1) He is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested.

(2) The person arrested was arrested for introxication only, and no further proceedings are desirable.

"(c) * * *."

Perhaps most important, when viewed in the facts of this present Petition, are the provisions of Section 40500, California Vehicle Code, which provides:

COPY BOUND T

"Whenever a person is arrested for any violation of this code not declared to be a felony, or for a violation of an ordinance of a city or county relating to traffic offenses and he is not immediately taken before a magistrate, as provided in this chapter, the arresting officer shall prepare in triplicate a written notice to appear in court or before a person authorized to receive a deposit of bail, containing the name and address of the person, the license number of his vehicle, if any, the name and address, when available, of the registered owner or lessee of the vehicle, the offense charged and the time and place when and where he shall appear."

In deciding People v. Superior Court (1972) 6 Cal.3d 757, supra, the California Supreme Court neither "clouded the slate" upon which the decision of Schmerber v. California (1966) 384 U.S. 757, was written by the United States Supreme Court, nor did it create any "uncertainty" whereby it

D TOO CLOSE IN CENTER

becomes necessary for the United States Supreme Court to "redefine the parameters of Schmerber," as requested by Petitioner.

The concept and dictate of a lawful arrest being an imperative condition precedent to any type of search is most vital and basic to the mandates of Constitutional law.

Respondent's basic arguments can perhaps be best set forth by quoting from People v. Superior Court, supra, where, speaking for the majority, Mr. Justice Sullivan, at page 762, declares:

> "The People favor us with no authority supportive of their startling proposition that in this context a lawful arrest is but a mere formality. Indeed this proposition runs directly counter to the law on search and seizure developed by the United States Supreme Court. '[T]his Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities

to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," Agnello v. United States, 269 U.S. 20, 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." Wong Sun v. United States, 371 U.S. 471, 481-482. "Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," United States v. Jeffers, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions.' (Fns. omitted.) (Katz v. United States (1967) 389 U.S. 347, 356-357."

And, further, at page 763:

"In Schmerber, the Supreme Court unequivocally stated that even a lawful arrest would not in itself justify a seizure of blood without a warrant, unless there was in addition a 'clear indication' that a blood-alcohol test will reveal intoxication. The court indicated that a more stringent test was applicable because of the great interest in protecting the human body from intrusion. In the light of the clear and consistent holdings of the high court in this area, it would indeed be incongruous to say that absent exigent circumstances an intrusion without a warrant into a person's home is per se unreasonable even though the authorities have probable cause to believe it contains contraband or evidence of crime, and to reason at the same time from the same legal premises that such an intrusion into his physical body is constitutionally permissible merely if they have probable cause

to believe it contains evidence of his intoxication.

"The Supreme Court has made it abundantly clear that the burden is on the People to show an overwhelming need that would justify a search without a warrant. 'The exceptions [to the requirement of a warrant] are "jealously and carefully drawn," [Jones v. United States, 357 U.S. 493, 499] and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." [McDonald v. United States, 335 U.S. 451, 456.] "[T]he burden is on those seeking the exemption to show the need for it." [United States v. Jeffers, 342 U.S. 45, 51.]' (Coolidge v. New Hampshire (1971) 403 U.S. 443, 455.)

"As we previously stated, the People attempt to meet this burden, by claiming that arrest is merely a formality, a ritualistic incantation of words, as it were, that in no way goes to the substance of the situation.

> At the same time the People argue that out of a humane consideration for the condition of the injured motorist, it is normal and proper police procedure not to arrest him until after the results of the blood-alcohol test are received. We are at a loss to determine how a meaningless ritual of words is at the same time so great a burden that it is inhumane to inflict this ritual upon an injured person. At any rate, the burden was never inflicted in the case at bench, since defendant was never arrested."

The essential distillate of Petitioner's Petition is this: Officer James Leonard failed, for reasons best known to himself, to follow the legislative and case law mandates and never arrested Respondent. Regardless of this lack of arrest, Officer Leonard nevertheless caused an intrusion to be made into the person of Respondent for the extraction of a blood alcohol sample. The facts of the case are clear:

(1) Respondent was stopped by the Officers, who suspected him of driving under the influence of intoxicants;

(2) Before an arrest was made, Respondent became unconscious, and was taken by the Officers for medical treatment -- during the course of this hospitalization, and, again, with no arrest having been made, the Officers ordered a blood sample to be taken from Respondent for blood alcohol analysis;

(3) During the entire procedure, from traffic stop to hospitalization, Respondent was never advised that he was under "arrest," nor was he in fact arrested, nor was any citation ever prepared for him by the Officers involved;

(4) After the taking of the test was completed, Respondent was "free to go," and released to the hospital.

Now, in view of the Officers' failure to comply with what are respectfully urged to be patently clear statutory procedures required for "arrest" in California, as have been set forth herein, Petitioner, the State of California, would have it that the United States Supreme Court should grant certiorari to provide "guidelines" for future situations of the type presented here. Respondent further respectfully urges that to petition the Supreme Court of the United States for such assistance is an unnecessary request.

The law of California, together with the decisions of the United States Supreme Court cited herein, require that a lawful arrest be a valid condition precedent to an intrusionary search. It would appear that the State of California's alleged dilemma presented by its Petition can be resolved by a simple directive, issued at an administrative level, to all peace officers who might possibly become involved with unconscious motorists suspected of intoxication, such directive couched in terms such as:

(A) If the motorist stopped for suspicion of driving while intoxicated either becomes unconscious, or is found unconscious at the scene of an accident, take such person into your custody and submit him to whatever medical treatment is deemed reasonably necessary under the circumstances.

(B) If the objective symptoms of intoxication so warrant, place the person under arrest for violation of the applicable statute or ordinance involved; make all reasonable efforts to audibly notify your suspect that he is, in fact, under arrest and advise of rights, if possible.

(C) In the event that your particular local situation requires placing your arrestee in the custody of civilians for medical treatment or hospitalization, prepare the citation required by Section 40500, California Vehicle Code, and, if possible, have the arrestee sign

the same. If the arrestee cannot or is not capable of signing, have such citation placed in his admission record at such civilian medical facility, and inform those in charge that he is (1) at least, to be handed or served with a copy of same upon discharge, or (2) preferably to sign same and retain a copy, with discharging personnel returning a signed copy (or proof of service) to the arresting agency.

(D) Once the citation or notice to appear specified in Section (C) is completed, you are then free to proceed with chemical tests for blood alcohol in a manner prescribed by law.

In the event that Officer Leonard had followed a procedure similar to the hypothetical one suggested above, it is submitted that Respondent would have been validly "arrested" and that these proceedings would never have come to be. However, such is not the case; for, Respondent was not arrested.

The machinery of prosecution can only be set in motion against a person, such as Respondent, by some form of notice; in situations involving persons driving while allegedly intoxicated, this "notice" must take the form of a lawful arrest - an arrest made in accordance with the statutory and decisional guidelines set forth above in this Response.

Respondent believes that this essential requirement of arrest-notice is the baseline upon which the Constitutional decisions involved in this matter are found. They are lacking in this instant case by reason of the facts, and not of the law. Therefore, certiorari, as has been discussed above, is neither an appropriate nor a required solution.

CONCLUSION

It is respectfully requested that the Court deny Petitioner's Petition for a Writ of Certiorari and thereby affirm the decision of the San Francisco Superior Court -- Appellate Division.

Respectfully submitted,

GILBERT C. CATON, Esq.
A Member of the Bar of this Court

-and-

FRANK BACON, Esq.

Attorneys for Respondent
EDGAR A. HILLS, JR.

COPY BOUND TO

THE BRIEF SHOP
legal printers

10844 VENTURA BLVD.,
POPLAR 3-2965

NORTH HOLLYWOOD
TRIANGLE 7-8620